In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 927

PYRAMID LAKE PAIUTE TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported. The memorandum order of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1970. A timely petition for rehearing was denied on October 2, 1970. The petition for a writ of certiorari was filed on November 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

410-749—70

QUESTION PRESENTED

Whether an Indian Tribe's 1968 application for intervention in this suit, which was filed 43 years earlier and involves only water rights in the Carson River, was properly denied because the Tribe claimed no rights in the Carson River and hence lacked an interest in the subject matter and because the application was untimely.

RULE INVOLVED

Rule 24(a), F.R.Civ.P., provides:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT

This suit was instituted by the United States in 1925 to quiet title to its rights and to adjudicate the relative rights of more than 400 defendants to Carson River waters in Nevada. Evidence (45 volumes of testimony and some 950 exhibits) was received between 1929 and 1940. In 1949 and 1950, temporary decrees were entered and a water master was ap-

pointed to administer the river. In 1951, the special (not water) master filed a proposed final decree which was amended in 1958. Many discussions among the parties relating to the proposed final decree followed.

Asserting water rights in the Truckee River and in Pyramid Lake, the Pyramid Lake Paiute Tribe filed a motion to intervene in 1968. Certain rights of the Tribe to Truckee River waters are set out in a decree of 1944 (*United States* v. *Orr Water Ditch Co.*, No. A3 (D. Nev.)), which specifies an 1859 priority of the Tribe in Truckee waters, as well as setting out water rights of the United States and hundreds of others. The Tribe asserted that, by reasons of the unitized operation of the Carson and Truckee Rivers and of a provision for diverting Truckee waters to the Carson to replace Carson waters used for a federal reclamation project (the Newlands Reclamation Project), the Tribe's water rights in the Truckee River are affected. Intervention was opposed by some of the defendants and by the United States.

Observing that the "'timely application' requirement of Rule 24 applies to Indians as well as other litigants" (Pet. App. B5), the court of appeals affirmed the district court's denial of the Tribe's motion to intervene because the motion was not timely. The court also ruled that, since the Tribe claims no rights in Carson River waters and the Tribe's water rights to the Truckee River are not involved in this suit and cannot be affected by adjudicating or settling rights

in the Carson, the Tribe is not affected in the "practical sense" required by Rule 24(a), F.R.Civ.P.[1]

The Tribe's petition for rehearing was denied without opinion.

ARGUMENT

The decision below is clearly correct; it does not conflict with any other decision and there is no reason for further review by this Court.

1. The Tribe has no interest in the subject matter of this suit, which is solely water rights in the Carson River. Concededly, the Tribe has rights in Truckee River waters, but, as the court below held, those rights, whatever they may be, cannot be affected by the decree in this case or by any settlement (Pet. App. B 9):

> The Tribe's interest in the Truckee has an 1859 priority and will be filled before water could be diverted by the owners of any subsequent interest or right. Any diversion to the Newlands Project, or subsequent project, which would encroach upon the earlier rights of The Tribe, would be a violation of the "Truckee

[1] The Tribe, on August 21, 1970, commenced an action in the United States District Court for the District of Columbia, No. 2506–70, against the Secretary of the Interior and the Attorney General, relating primarily to the Tribe's Truckee rights and the maintenance of "Pyramid Lake as a fishery and as a stable and viable body of water" (Pet. 9). The defendants' motions to dismiss—for failure to state a claim upon which relief can be granted and for lack of jurisdiction—are pending the Tribe's response.

River Decree", entered in the *Orr Water Ditch Co.* case.[2]

Except for assertion of Truckee water rights, there appears to be no reason for the Tribe's intervention (see Pet. 14). Litigation of water rights in a single stream is extremely complex in itself; plainly, the Tribe's Truckee claims should not be interjected into this proceeding involving only Carson water rights. *Vinson* v. *Washington Gas Co.*, 321 U.S. 489, 498.

2. Denial of intervention was also correct because the Tribe's application was not timely. Rule 24(a), F.R. Civ. P. Intervention was sought here in complex, burdensome litigation, involving numerous small parties on the Carson, some 43 years after the filing of the complaint, about 27 years after the trial was concluded, and after the death of most of the witnesses who testified from memory concerning early appropriations of Carson River waters. Further, as both courts below mentioned, the parties in this case were on the threshold of agreeing to a final decree at the time of the Tribe's application (Pet. App. A 4, B 6).

[2] Lack of an interest in the proceeding which can be adversely affected clearly distinguishes *Cascade Nat. Gas* v. *El Paso Nat. Gas*, 386 U.S. 129, and the other cases cited by the Tribe (Pet. 10–11, 16–18). Here, "The Tribe is in basic agreement with the reasoning of the Ninth Circuit" (Pet. 12), and does not show why its Truckee claims must be introduced in this case. Clearly, the Tribe's assertions of the United States' conflict of Truckee interests and failure to press the Tribe's Truckee claims in the *Orr Ditch* case are patently outside the proper scope of this case (Pet. 9, 13, 15, 20–21).

In these circumstances, the courts below appropriately concluded that intervention at this late date was not timely sought.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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